



CABINET FOR FAMILIES AND CHILDREN  
COMMONWEALTH OF KENTUCKY  
FRANKFORT 40621

DEPARTMENT FOR SOCIAL INSURANCE  
DIVISION OF CHILD SUPPORT ENFORCEMENT  
"An Equal Opportunity Employer M/F/D"

Information Release #694

TO: All IV-D Agents

DATE: November 22, 1996

SUBJECT: Establishment or Modification of a Support Order for  
Incarcerated Noncustodial Parents

An incarcerated noncustodial parent may have income or assets which can be levied or attached. It is inappropriate to eliminate a noncustodial parent's child support obligation on the grounds that the parent is incarcerated and therefore does not have any income. The noncustodial parent's children have been required to endure the parent's incarceration; they should not have to endure the additional deprivation of a reduced standard of living if the incarcerated parent has property or assets which can be liquidated to satisfy a child support obligation or delinquency.

A IV-D case which involves the establishment or modification of a support obligation for an incarcerated noncustodial parent is referred by area office caseworkers to the appropriate contracting official for judicial action. The electronic referral is followed by a DCSE Transmittal (Form CS-15) with a copy of the Court of Appeals' opinion (case law) *Redmon versus Redmon* attached to it. Contracting officials are to take appropriate legal action on the referral.

In *Redmon versus Redmon*, which is attached to this information release, the Court of Appeals ruled against an incarcerated father who wanted to eliminate his child support obligation on the grounds that he had no income. The trial court had determined that modification was not appropriate despite the incarcerated father's lack of income. It had concluded that the father's incarceration could not be considered involuntary, was caused by his own conscious act, and was not a basis for modifying the agreed amount of child

**"CHILDREN FIRST"**

Information Release #694  
November 22, 1996  
Page Two

support. The Court of Appeals affirmed the trial court's decision on the basis that the incarcerated father did not claim to be indigent nor did he state that he had no property which could be used to satisfy his child support obligation.



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STEVEN P. VENO, DIRECTOR  
DIVISION OF CHILD SUPPORT ENFORCEMENT

Attachment

Cross References:

Handbook Section 16.000, Administrative Establishment  
Handbook Section 27.000, Review and Modification of Support Orders  
for Kentucky IV-D Cases

Inquiries: Area Office Managers

torneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise.

In *White, supra*, this Court upheld the circuit court's findings which held a non-party to an injunction in contempt for actions in which he participated with a party to the injunction. *White, supra*, at 388. While it is clear that the appellant had actual knowledge of the injunction because of the March 16, 1989, agreed order, the record is devoid of any facts which show that the appellant was in concert or participation with Goodman at the time she performed the acts which were allegedly in violation of the injunction. It is not enough to show that appellant was in concert or participation with Goodman at some previous time; once this concert or participation ended, she was no longer bound by the injunction because she was not a party to it. The court did not err in issuing an arrest warrant for the appellant based on Arnold's affidavit or in refusing to dismiss the case on the pleadings because of the assertion of the appellee that it could prove that the appellant was in concert or participation with Goodman. However, the court should have granted appellant's motion for a directed verdict at the close of the appellee's case since it was apparent that the appellee was relying on past proceedings to prove that the appellant was in concert or participation with Goodman at the time of the acts in question. While we do not approve or condone the actions of the appellant, we are compelled under the law to reverse the circuit court's order.

Therefore, the order of the Hardin Circuit Court is reversed and remanded with directions that the appellant's motion for a directed verdict be granted.

All concur.



Charles R. REDMON, Appellant,

v.

Charlene REDMON, Appellee.

No. 91-CA-328-S.

Court of Appeals of Kentucky.

Jan. 24, 1992.

Father appealed from order of the Circuit Court, Woodford County, David L. Knox, J., refusing to modify his child support obligation. The Court of Appeals, McDonald, J., held that trial court was not required to eliminate father's child support obligation under child support guidelines on grounds that father was incarcerated and did not have any income, where father did not claim to be indigent, and did not state he had no property to satisfy the support obligation.

Affirmed.

1. Divorce  $\Leftarrow$  310

Trial court was not required to eliminate father's child support obligation under child support guidelines on grounds that father was incarcerated and did not have any income, where father did not claim to be indigent, and did not state he had no property to satisfy the support obligation. KRS 403.212(2)(d).

2. Divorce  $\Leftarrow$  308

Child support guidelines are not designed to cover all possible scenarios in which divorcing parents find themselves and legislature has not taken away trial court's broad discretion in ensuring that needs of their children will continue to be met. KRS 403.212(6).

3. Parent and Child  $\Leftarrow$  3.1(5)

Statutory provision for imputing income to one unemployed or underemployed can only be utilized when one purposely terminates his or her employment or changes to employment with lower pay with intent to interfere with his or her child support obligation. KRS 403.212(2)(d).

#### 4. Parent and Child $\S$ 3.3(7)

Child support guidelines, which are exclusively tied to income, are not appropriate where noncustodial parent has no income, but may have sufficient assets from which support can be obtained. KRS 403.212(6).

G. Scott Staples, Versailles, for appellant.

Michael L. Judy and Richard M. Guarnieri Stoll, Keenon & Park, Frankfort, for appellee.

Before HOWERTON, HUDDLESTON and McDONALD, JJ.

McDONALD, Judge.

Charles and Charlene Redmon were married in 1976 and divorced in 1989. Two children, now ages 6 and 10, were born during their marriage. At the time Charlene filed a petition for legal separation, Charles was employed as the Chief of Police of Woodford County. In his response seeking a dissolution, filed January 17, 1989, Charles asserted he was unemployed. Nevertheless, at the hearing on the petition in July, Charles was self-employed, and at that time he entered into a property settlement agreement in which he agreed to pay child support in the sum of \$550 per month and to pay an additional \$113.84 for medical insurance for the children. The agreement was incorporated into the decree of dissolution entered July 31, 1989, having been found by the trial court to be fair and conscionable.

A year later Charles moved for a reduction in child support. In his motion he stated he had pled guilty to criminal charges in federal court and, because he was incarcerated in a federal correctional facility in Atlanta, Georgia, he had no income. His motion did not specify what crime he had committed or how long a sentence he would be required to serve. He wanted his support obligation reduced to nothing. There was no evidentiary hearing conducted in this matter; however, pleadings in the record indicate that Charles had participated in one or more

bank robberies, that these crimes had been committed before his execution of the property settlement agreement, and that he would be in prison for at least four years.

The commissioner recommended that child support be modified utilizing an imputed income of \$4 per hour, or \$688 gross monthly income. Both parties took exceptions to the recommendation. Because it was undisputed that Charles earned only \$5 per month in prison, he insisted he should pay no support according to the child support guidelines. Charlene argued that Charles was estopped from raising his incarceration as a defense to his obligation to pay child support, as Charles was aware of the possibility of his imprisonment at the time he entered into the property settlement agreement.

The trial court determined that despite Charles' total lack of income, modification was not appropriate. It concluded that Charles' incarceration could not "be considered to be involuntary" as it was "caused by his own conscious act," therefore precluding any basis to modify the agreed amount of child support. The trial court was not unaware of the reality of Charles' situation and further provided that, upon his return to society, consideration would be given to Charles' ability to pay the arrearages accumulated during his incarceration.

[1] In his appeal to this Court, Charles insists the trial court erred in failing to utilize the child support guidelines set out in KRS 403.212(6) which, considering his current lack of income, would mandate a total elimination of any support obligation. He criticizes the court for failing to make findings in support of its deviation from the guidelines as required by KRS 403.211(2). This statute reads:

(2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may

deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.

[2] The appellant's argument that the trial court did not comply with the requirement to explain in detail its deviation from the guidelines is specious. The trial court was clear in its judgment that application of the guidelines was inappropriate because Charles had voluntarily committed criminal acts resulting in his confinement and the concomitant loss of income. KRS 403.211(3)<sup>1</sup> lists the criteria a trial court should utilize in its determination of whether the application of the guidelines "would be unjust or inappropriate." Subsection (g) of that statute allows deviation for "[a]ny similar factor of an extraordinary nature specifically identified by the court..." KRS 403.211(4) further provides that the circumstances considered as "extraordinary ... shall be determined by the court in its discretion." Clearly the guidelines are not designed to cover all the possible scenarios in which divorcing parents find themselves, and the legislature has not taken away the trial court's broad discretion in ensuring that the needs of their children will continue to be met.

[3] Although the trial court mentioned the concept of voluntary unemployment as contemplated in KRS 403.212(2)(d),<sup>2</sup> the un-

derpinning of its judgment is simply that the guidelines are inappropriate under the undisputed factual circumstances of this case. We are in complete agreement with the holding in *McKinney v. McKinney*, Ky. App., 813 S.W.2d 828, 829 (1991), that the statutory provision for imputing income to one unemployed or underemployed can only be utilized, "when one purposely terminate[s] his employment or changes to employment with lower pay with an intent to interfere with his support obligation."

There is, we agree, no evidence, or even a hint, that Charles committed the crimes for which he is serving time to avoid his child support obligation, although he certainly must have realized his conduct was inimical to the interest of his children. As stated before, however, while the commissioner did rely on KRS 403.212(2)(d) in recommending that the appellant's support obligation be reduced, the trial court did not utilize this statute to support its decision. The trial court declined to use the guidelines finding them inappropriate as a matter of law.

This issue was recently considered by the Court of Appeals of Oregon which reversed a decision of the trial court suspending a father's child support obligation until 60 days after his release from prison. The Oregon court, as the appellant has informed us, had previously held in *Edmonds v. Edmonds*, 53 Or.App. 539, 542, 633 P.2d 4 (1981), that a parent in prison

(g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

1. The complete list includes the following criteria:

- (a) A child's extraordinary medical or dental needs;
- (b) A child's extraordinary educational, job training, or special needs;
- (c) Either parent's own extraordinary needs, such as medical expenses;
- (d) The independent financial resources, if any, of the child or children;
- (e) Combined parental income in excess of the Kentucky child support guidelines;
- (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the federal Social Security Act; and

2. KRS 403.212(2)(d) concerning the concept of imputed incomes provides:

(d) If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

for a crime was not liable for child support payments while incarcerated "in the absence of some showing that he became imprisoned in order to avoid his support obligation." However, in *Willis v. Willis*, 109 Or.App. 584, 820 P.2d 858 (1991), that court reasoned as follows in overruling the *Edmonds* decision:

Criminal conduct of any nature cannot excuse the obligation to pay support. We see no reason to offer criminals a reprieve from their child support obligations when we would not do the same for an obligor who voluntarily walks away from his job. Unlike the obligor who is unemployed or faced with a reduction in pay through no fault of his own, the incarcerated person has control over his actions and should be held to the consequences.... A person who has a support obligation should not profit from his criminal conduct, particularly at his children's expense. We recognize that an individual in father's situation—assuming that he is genuinely indigent and unable to pay—cannot be found in contempt for not paying support while incarcerated. However, this is not a contempt proceeding; it is simply a modification proceeding. Father should not be able to escape his financial obligation to his children simply because his misdeeds have placed him behind bars. The meter should continue to run.

The appellee has cited additional foreign authority with similar holdings. See, e.g., *Division of Child Support Enforcement, ex rel. Harper v. Barrows*, 570 A.2d 1180 (Del., 1990); *Parker v. Parker*, 152 Wis.2d 1, 447 N.W.2d 64 (1989); and *Proctor v. Proctor*, 773 P.2d 1389 (Utah App., 1989). *Contra, Leasure v. Leasure*, 378 Pa.Super. 613, 549 A.2d 225 (1988).

[4] Additionally, we believe that the guidelines, which are exclusively tied to income, are not appropriate where the non-custodial parent has no income, but may have sufficient assets from which support can be obtained. In his motion to modify,

3. As there was no evidentiary hearing, the appellant's assets, or lack thereof, are not a matter

Charles did not claim to be indigent, nor did he state he had no property to satisfy the support obligation.<sup>3</sup> Despite the recent enactments concerning child support, our trial courts have retained broad powers to fashion a remedy that will best ensure that children of divorce are as minimally deprived as possible. Charles argued to the trial court that its refusal to eliminate his support obligation in its entirety amounted to additional punishment for the crimes he committed. While Charles' needs are all being met, however, his children have been required to endure their parents' divorce and his subsequent incarceration. They should not have to bear additional deprivation in the form of a reduced standard of living if the appellant has property, or potential sources of assets, which could be liquidated to satisfy any support delinquency or arrearage.

Accordingly, the judgment of the Woodford Circuit Court is affirmed.

All concur.



Tommy MAYO and Pam Mayo, Appellants,

v.

CENTURY 21 ACTION REALTORS, INC., Appellee.

No. 90-CA-002469-S.

Court of Appeals of Kentucky.

Jan. 24, 1992.

Real estate broker brought action against vendors to recover commission for sale of house made during extension period of exclusive-listing contract. The McCracken Circuit Court, J.W. "Bill" Graves, J.,

of record.